

DOUBLE JEOPARDY — Retrial barred if mistrial caused by prosecutorial misconduct — Revised 11/2009

Ordinarily, if the defense seeks a mistrial, the defense waives its double jeopardy objection to a retrial. See *U.S. v. Dinitz*, 424 U.S. 600, 607-610 (1976); *State v. Wilson*, 134 Ariz. 551, 554, 658 P.2d 204,207 (App. 1982). However, there is an exception to this rule if the prosecution's misconduct forces the defense to seek a mistrial. In federal court, the bar of double jeopardy prohibits the case from being retried only if the prosecutor commits misconduct which is intended to goad the defendant into moving for a mistrial. *Oregon v. Kennedy*, 456 U.S. 667, 676 (1982). Arizona adopted a much broader version of the *Oregon v. Kennedy* exception in *Pool v. Superior Court*, 139 Ariz. 98, 108-09, 677 P.2d 261, 271-72 (1984). The *Pool* court held that, in Arizona, after a mistrial is granted because of prosecutorial misconduct, the double jeopardy clause bars a retrial only if all three of the following factors exist:

1. Mistrial is granted because of improper conduct or actions by the prosecutor; and
2. such conduct is not merely the result of legal error, negligence, mistake, or insignificant impropriety, but, taken as a whole, amounts to intentional conduct which the prosecutor knows to be improper and prejudicial, and which he pursues for any improper purpose with indifference to a significant resulting danger of mistrial or reversal; and
3. the conduct causes prejudice to the defendant which cannot be cured by means short of a mistrial.

Miller v. Superior Court, 189 Ariz. 127, 130, 938 P.2d 1128, 1131 (App. 1997). See also *State v. Hughes*, 193 Ariz. 72, 80, 969 P.2d 1184, 1192 (Ariz. 1998).

This exception requires *intentional* misconduct by the prosecutor, pursued with an improper purpose; mere prosecutorial oversight or inadvertence is insufficient to bar

the case from retrial.¹ See *State v. Lamar*, 205 Ariz. 431, 440, 72 P.3d 831, 840 (2003) (“inartfully framed” question by prosecutor was not intentional misconduct “with an improper purpose or indifference to a significant resulting danger of mistrial or reversal.”) In addition, the prosecutor’s conduct is considered as a whole; the court will not focus on an isolated incident if it is an “insignificant impropriety.” *State v. Aguilar*, 217 Ariz. 235, 238-39, 172 P.3d 423, 426-27 (App. 2007).

¹ See also *State v. Detrich*, 178 Ariz. 380, 385, 873 P.2d 1302, 1307 (1994) (rejecting defendant’s claim that state’s misconduct in first trial raised double jeopardy bar to second trial because the prosecutor had not “*deliberately* injected error in the first trial in order to force the defendant to request a mistrial”) (emphasis in original); *State v. Trani*, 200 Ariz. 383, 26 P.3d 1154 (App. 2001) (finding that objective facts did not indicate intentional misconduct for an improper purpose by the prosecutor but an isolated error distinguishable from the pattern of misconduct at issue in *Pool v. Superior Court*).